

BEFORE

THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NO. 91-229-T - ORDER NO. 91-1110 ✓

DECEMBER 19, 1991

IN RE: Application of Yellow Freight System,)
Inc., 10990 Roe Avenue, P. O. Box 7270,) ORDER
Overland Park, KS 66207, for a Class E) GRANTING
Certificate of Public Convenience and) APPLICATION
Necessity.)

This matter is before the Public Service Commission of South Carolina (the Commission) on the April 18, 1991 Application of Yellow Freight System, Inc. (Yellow or the Applicant) for a Class E Certificate of Public Convenience and Necessity¹ authorizing it to transport property as follows:

COMMODITIES IN GENERAL (EXCEPT COMMODITIES IN BULK, IN TANK TRUCKS; EXPLOSIVES, RADIOACTIVE MATERIALS, AND OTHER DANGEROUS MATERIALS; HOUSEHOLD GOODS; AND COMMODITIES NORMALLY TRANSPORTED BY ARMORED CAR): BETWEEN POINTS AND PLACES IN SOUTH CAROLINA.

This Application was filed pursuant to S.C. Code Ann. §58-23-40 (1976).

Subsequent to the initiation of this proceeding, the Executive Director of the Commission instructed the Applicant to cause to be published a prepared Notice of Filing in certain newspapers of general circulation in the State of South Carolina. The Notice of

1. "A class E motor carrier is a common carrier of property by motor vehicle which does not operate upon any particular route or particular schedule and which is commonly known as an irregular route common carrier." 26 S.C. Regs. 103-114(1976).

Filing indicated the nature of the Application and advised all interested parties desiring to participate in the proceeding of the manner and time in which to file the appropriate pleadings. The Notice of Filing was duly published in accordance with the instructions of the Executive Director. Petitions to Intervene were filed by Southeastern Freight Lines (Southeastern), and Fredrickson Motor Express, Inc. (Fredrickson).² Estes Express Lines (Estes) filed a letter of protest.

A hearing was held at the Offices of the Commission on October 9 and 23, 1991. The Honorable Marjorie Amos-Frazier presided. The Applicant was represented by Robert T. Bockman, Esquire, and William F. Martin, Esquire; the Intervenors were represented by F. Lee Prickett, Jr., Esquire, and John G. Felder, Esquire; and the Commission Staff was represented by Gayle B. Nichols, Staff Counsel.

After a full consideration of the testimony presented and the applicable law, the Commission makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. South Carolina Code Ann. §58-23-330 (1990 Supp.) provides as follows:

[a]n applicant applying for a certificate . . . to operate as a motor vehicle common carrier may be approved upon showing . . . that the applicant is fit, willing, and able to perform appropriately the proposed service. If an intervenor shows or if the [C]ommission determines that the public convenience and necessity is

2. Southeastern and Fredrickson will be referred to collectively as the Intervenors.

being served already, the [C]ommission may deny the application.

2. 26 S.C. Regs. 103-134(1)(A)(1)(Supp. 1990) provides, in relevant part, that the Commission use the following criteria to determine whether an applicant is fit, willing, and able to provide the requested service:

- (a) FIT The applicant must demonstrate or the Commission determine that the Applicant's safety rating is satisfactory. This can be obtained from U.S.D.O.T., SCDHPT, and PSC safety records. Applicants should also certify that there are no outstanding judgments pending against such applicant. The applicant should further certify that he is familiar with all statutes and regulations, including safety regulations, governing for-hire motor carrier operations in South Carolina and agrees to operate in compliance with these statutes and regulations.
- (b) ABLE The applicant should demonstrate that he has either purchased, leased, or otherwise arranged for obtaining necessary equipment to provide the service for which he is applying. The Applicant should also provide evidence in the form of insurance policies or insurance quotes, indicating that he is aware of the Commission's insurance requirements and the cost associated therewith.
- (c) WILLING Having met the requirements as to 'fit and able', the submitting of the application for operating authority would be sufficient demonstration of the applicant's willingness to provide the authority sought.

3. "The doctrine of [public] convenience and necessity is a relative or elastic theory. The facts in each case must be separately considered and from those facts it must be determined whether public convenience and necessity requires a given service to be performed or dispensed with." State v. Carolina Coach Company, 260 N.C. 43, 52, 132 S.E.2d 249, 255 (1963).

4. "'Necessity' means reasonably necessary and not absolutely imperative." Id. citing State v. Southern Railway Co., 254 N.C. 73, 79, 118 S.E.2d 21, 25 (1961). ". . . It is necessary if it appears reasonably requisite, is suited to and tends to promote the accommodation of the public." Id.

5. "In the phrase 'public convenience and necessity' the word 'necessity' means that which is needful, essential, requisite or conducive to 'public convenience'. When more convenient and adequate service is offered to the public, it would seem that necessity requires such public convenience should be served." Atlantic Greyhound Corporation v. Commonwealth of Virginia, 196 Va. 183, 193, 83 S.E.2d 379, 384 (1954).

6. The South Carolina Supreme Court has held that while an intervenor's testimony that its business will be adversely affected by the increased competition produced by an increased number of motor carriers is relevant, such testimony "is not determinative and 'should not in itself defeat an application for additional services'." Welch Moving and Storage Co. v. Public Service Commission, 301 S.C. 259, 391 S.E.2d 556, 557 (1990), citing Greyhound Lines, Inc. v. South Carolina Public Service Commission, 274 S.C. 161, 166, 262 S.E.2d 18, 21 (1980).

7. Yellow's April 18, 1991 Application indicates that the Applicant is an Indiana corporation which has its principal place of business in Kansas. The Application further indicates that Yellow received a "satisfactory" rating from the United States Department of Transportation (U.S.D.O.T.) on May 23, 1990, that

Yellow has no outstanding judgments, that Yellow is familiar with all statutes and regulations governing for-hire motor carrier operations in South Carolina and agrees to comply with these statutes and regulations, and that Yellow is aware of the Commission's insurance requirements and the associated insurance premium costs. Yellow attached a quote of its current liability and cargo insurance policies to its Application. In addition, Yellow attached financial exhibits to its Application which indicate the Applicant is financially stable. Attachments to the Application further reveal that Yellow has sufficient equipment to provide intrastate service in South Carolina.

8. Yellow's Charlotte, North Carolina, Area Manager, C.B. Albis, testified that the Applicant presently holds Class E Interstate Commerce Commission (ICC) authority, that the Applicant has 640 terminals nationwide, and serves 400,000 customers. Mr. Albis explained that Yellow entered the South Carolina market on an interstate basis in 1965. He testified that Yellow has eleven South Carolina terminals which employ 150 employees and that the payroll for these employees totaled approximately \$5,400,000 in 1990. Mr. Albis briefly explained Yellow's safety program and entered a summary of the program into evidence. Hearing Exhibit #3.

9. Mr. Albis testified that, if granted its requested authority, Yellow will be able to provide its shippers with the advantage of shipping freight over short and long hauls and that, consequently, it will be a "total carrier." Mr. Albis testified

that, unlike Yellow, existing carriers can not ship commodities on a nationwide basis.

10. Mr. Albis explained that Yellow intends to operate as a "less-than-truckload" (LTL) carrier. Using its Charlotte, North Carolina terminal as its hub, Mr. Albis testified that Yellow's delivery time would be two days. Mr. Albis admitted that the current LTL market probably made deliveries the next day but that shippers do not always need freight delivered the next day.

11. Mr. Albis testified that, despite negotiations with union officials, Yellow has the ability to perform the services requested by its Application. He stated that Yellow's request for authority was not contingent on the outcome of any union contract.

12. Yellow presented the testimony of ten "shipper witnesses."³ Of these ten shippers, eight testified that their intrastate shipping needs were presently being met by other motor carriers but that they would find service by Yellow more convenient. One witness, Walt Novak of Prym-Dritz Corporation, testified that at times he was dissatisfied with the responsiveness and service of the regional intrastate carriers. Mark Jakiela of Anchor Continental, Inc. testified that, at times, his company's transportation needs were not met by the current intrastate motor

3. These shippers were Anchor Continental, Inc. of Columbia, Carolina Steel and Wire Corporation of Lexington, Pirelli Cable Corporation of Greenwood, Oneita Industries of Andrews, Quality Printing Company of Orangeburg, American Yard Products of Orangeburg, P. Kaufmann, Inc. of Fort Mill, Coats America of Greer, Piedmont Dielectric of Woodruff, Colonial Rubber Works of Kingstree, and Prym-Dritz Corporation of Spartanburg.

carriers. He also testified that only 5% of his customers required next day delivery. Witnesses Susan R. Fleming of Quality Printing Company and Roger St. Pierre of American Yard Products testified that due to the location of its Orangeburg terminal Yellow can pick up their companies' products at later hours or in emergencies when other carriers are unavailable. Buddy Guest of Piedmont Dielectric testified that Yellow's driver stops by his business at more convenient times than other carriers.

Eight of the shippers emphasized that, unlike other carriers with intrastate authority, Yellow had the ability to leave a trailer at their loading docks for a day or so and that this was an advantage because it eliminated the need for storage of the freight and allowed them to load freight as it was produced. Additionally, several shippers stated that it was an economic advantage by Yellow leaving a trailer at their loading docks.

13. John C. Rader of Southeastern testified on behalf of the Intervenor. Mr. Rader testified that Southeastern has a Class E Certificate and the ability to serve all points in South Carolina. He testified that his company provides next day service and that Southeastern has excess capacity. Mr. Rader testified that Yellow's entry into the intrastate market would have an economic impact on his company and on the shipping public, but he admitted he could not quantify Yellow's effect on the market share or the quality of service.

14. John Luckadoo of Fredrickson also testified on behalf of the Intervenor. He explained that Fredrickson has Class E

authority in South Carolina. Mr. Luckadoo expressed concern that shippers desire next day delivery and that Yellow's entry into the market would destroy this service. Mr. Luckadoo stated that his business presently meets all public needs, that it can meet growing needs, and that the convenience provided by Yellow would be at a price to existing carriers. Luckadoo admitted he did not know the percentage of Fredrickson's market share that would be reduced by Yellow's entry into the intrastate market.

15. Paul Dugent of Estes testified that his company opposed issuance of the certificate, particularly because Yellow would effect the rate levels in South Carolina. Dugent explained that his Company had already been affected by a 10.7% reduction in market share between January to September 1990 and the same months in 1991. Dugent testified that there are a sufficient number of motor carriers with general authority in South Carolina.

16. Three shipper witnesses testified on behalf of the Intervenor⁴s. These witnesses testified their needs were being met by the present shippers and that it was extremely important to them to have next day delivery. Wendell Weaver of Cooperative Electric Utility Energy Supply testified that Southeastern and Estes would leave their trailers at his company's loading dock.

17. Robert J. Zuelsdorf also testified on behalf of the Intervenor⁴s. Mr. Zuelsdorf testified that he had appeared before

4. These shippers were Chickasaw Processing Company of Greenwood, J.W.R. Sales Company of Charleston, and Cooperative Electric Utility Energy Supply of Lexington.

the Commission as an expert witness on other occasions. He explained that in 1990 his company, Wilbur Smith Associates, had conducted a survey of shippers and receivers in South Carolina concerning their usage of LTL carriers and the quality of LTL service in South Carolina. Mr. Zuelsdorf explained his survey⁵ and expressed his opinion that, according to his survey, the shippers' and receivers' needs were presently being met by the intrastate LTL carriers.

On cross-examination, Mr. Zuelsdorf admitted the responses to his 1990 survey had not been updated and that the survey respondents were not asked if it would be more convenient to have the same shipper for interstate and intrastate shipments. Mr. Zuelsdorf testified that he didn't know that if shippers "having [their] needs being met" meant that public convenience and necessity was being served.

CONCLUSIONS OF LAW

1. Yellow has demonstrated that it is fit, willing, and able to provide Class E service to points in South Carolina. Specifically, Yellow has established that there are no outstanding judgments against it, that it is familiar with all statutes and regulations governing for-hire motor carrier operations in South Carolina, and that it agrees to operate in compliance with these statutes and regulations. Additionally, Yellow has demonstrated that it has the equipment necessary to provide the Class E

5. The survey was entered as Hearing Exhibit #7.

authority it seeks and has provided evidence of insurance which meets the Commission's requirements. Finally, Yellow has demonstrated that its safety rating is satisfactory through the submission of its U.S.D.O.T. safety rating. The Commission interprets the submission of its Application as Yellow's demonstration of its willingness to provide Class E service.

2. Based on the testimony of Yellow's witnesses, the Commission finds that public convenience and necessity require that Yellow's Application be approved. While most of Yellow's shipper witnesses testified that their shipping needs were being met, they nonetheless testified that Yellow's service would be more convenient due to the location of its terminals and its ability to leave a trailer in their loading docks. Moreover, two of the shipper witnesses testified they were not satisfied with the current intrastate carrier market. In addition, the Commission finds that the inability of the Intervenor's expert witness to state that public convenience and necessity were being met further supports its conclusion that public convenience and necessity are presently not being met. Finally, the Commission finds that Yellow's ability to perform as a "total carrier" will benefit the shipping public in South Carolina.

3. Finally, although the Commission recognizes the Intervenor's concerns that Yellow's entrance into the market will harm their business, the Commission concludes that this fact in and of itself is insufficient to defeat Yellow's Application in light of the abundant evidence that Yellow's service will provide a

variety of advantages to the intrastate market.

IT IS THEREFORE ORDERED:

1. Yellow's Application for Class E authority to transport commodities in general, with the exceptions noted on page 1 of this Order, between points and places in South Carolina is hereby approved.

2. Yellow shall file the proper license fees and other information required by S.C. Code Ann. §58-23-10 to -1830 (1976, as amended) and by 26 S.C. Regs. 103-100 to -272 (1976, as amended), within sixty (60) days of the date of this Order, or within such additional time as may be authorized by the Commission.

3. Upon compliance with S.C. Code Ann. §58-23-10 to -1830 (1976, as amended), and the applicable provisions of 26 S.C. Regs. 103-100 to -272 (1976, as amended), a certificate shall be issued to Yellow authorizing the motor carrier services granted herein.

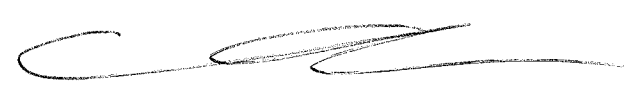
4. Prior to compliance with the above-noted requirements and receipt of a certificate, the motor carrier services authorized herein may not be provided.

5. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:


VICE Chairman

ATTEST:


Deputy Executive Director

(SEAL)